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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission

In the Matter of	)	
	)	
Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

To: The Commission

PETITION FOR RECONSIDERATION

E! Entertainment Television, Inc. ("E!"), by its attorneys and pursuant to §1.429 of the Commission's Rules, hereby petitions for reconsideration of the Commission's Report and Order in MM Docket 92-266, FCC 93-177 (released May 3, 1993) (the "Order").

INTRODUCTION

E! provides a relatively new advertiser-supported programming service[1], to 21.5 million of the potential 57.2 million[2] cable households. Because of its continuing struggle to gain access to the remaining 35.7 million cable households and to subscribers of other multi-channel video distribution systems, E! participated in the initial phase of this rule making proceeding out of serious concern over the impact that the ensuing rules might have on cable operators' ability to add new programming and, correspondingly, on the

[1] E! has been distributed in its current format of 24-hour entertainment news, information and features since July, 1990.

[2] According to A. C. Nielsen Co., as reported in Cable Television Developments, National Cable Television Association, March 1993.

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ability of E! and other newer entrants to the programming industry to gain access to additional viewers whose cable systems do not yet carry their services.

E! agrees with the Commission's assessment that a benchmark approach should be the principal method of rate regulation because it could be easier to administer than a cost-of-service approach. In its comments in the rule making, however, E! expressed concern that a benchmark approach, if too rigid, would discourage cable systems from adding new programming to existing channels or from investing in technical upgrades to add channels needed to house new programming.

Unfortunately, E!'s early concerns were not unfounded; the rule making culminated in adoption of rules that are bringing many of E!'s negotiations for carriage on additional cable systems to a halt. This situation results from three major problems with the rules: (1) disincentives in the benchmark option for cable operators to add new programming services; (2) a provision precluding vertically-integrated cable companies under the benchmark from recovering increased costs for affiliated programming services to the same extent as cable operators that have no ownership stake in programming;[3] and (3) disincentives in the benchmark for

[3] This surprising Commission decision particularly troubles E!, which owes most of its current success to financial support from cable industry investors.

cable operators to invest in technical upgrades capable of increasing channel capacity. E!'s concerns and some recommendations for resolving them are set forth below

1. Increasing Incentives for New Programming

a. Restrictions on Vertically-Integrated Cable Systems

E's principal and most immediate concern with the new rules' impact on programming is § 76.922(d)(2)(vi), which denies vertically-integrated cable operators using the benchmark approach the opportunity to recover increases in programming costs to the same extent as cable operators who have not invested in the development of new programming. E! urges the Commission to reconsider this rule.

The record in this proceeding does not demonstrate that programming services will overcharge their investors' systems so that pass-throughs will enable the programmer or the operator to make more money. Neither does the legislative history of Section 628 of the Cable Act, the program access provision, support this view. Rather, Congress enacted safeguards to prevent programmers from discriminating in favor of their affiliated cable companies with lower prices and more favorable terms. For example, the Senate Report on S.12 states that "the Committee received testimony that vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through <u>more favorable prices and terms</u>."[4]

E! offers its own practices and experience as evidence that the restriction on program pass-throughs for vertically-integrated cable operators in unnecessary. E!'s longopportunity nor the incentive to jeopardize an otherwise effective pricing structure and business practices in an effort to increase revenues from raising rates for systems of its investor companies.

As E! explained to the Commission in its comments in another Cable Act implementation proceeding (MM Docket 92-264 dealing with ownership issues), E! and many other innovative programming networks[6] exist today only because members of the cable industry came forward with an infusion of capital at crucial stages in such networks' growth and development. The Commission's unexpected and, E! submits, unnecessary, restrictions on these companies' external costs unfairly penalize them for their important contributions to television diversity. The rule has the added drawback of discouraging continued industry support for and investment in programming in the future. Clearly, this cannot possibly be the result envisioned by the Commission.

For all the reasons stated above, the Commission should not adopt a blanket limitation on the pass-through of programming costs by cable operators that have ownership ties with programmers. If the Commission determines that improper cost-shifting is occurring, the Commission or other

[6] CNN, C-SPAN, The Discovery Channel, The Learning Channel, Black Entertainment Television and Mind Extension University, to name just a few.

authorities with jurisdiction over rates have appropriate remedies available.

b. Disincentives for Adding New Services

E! also is concerned about how adding new programming is treated under the benchmark approach. Although the rules permit cable systems to treat increases in the cost of existing programming services as external costs, it is not clear how increased program costs attributable to adding brand new program services are to be treated. Presumably the "going forward" worksheets the Commission intends to release for calculation of permitted rate increases will deal with this.

The only thing that is clear at this time is that there is a significant time lag between when a cable system incurs an increased cost for programming and when the system can begin to recover the increase. The starting date for measuring changes in programming costs for purposes of the pass-through is the date on which the system becomes subject to regulation or 180 days after the effective date of the regulations (October 1, 1993, according to the Commission's Order of June 11, 1993), whichever occurs first. Thus, there will be a significant time period during which cable systems can incur increases in programming costs but have no opportunity for recovering them.

The Commission can minimize the delay (and eliminate the disadvantages of having the starting date subject to variation from operator to operator) by making all external costs -- including increases in programming costs -- eligible for pass-through as of the effective date of the regulations.

2. Incentive to Expand Channel Capacity

E! is confident that its struggle for carriage on a limited supply of vacant existing cable channels will be eased when digital compression and other technological advancements enable cable systems to add channels. Unfortunately, the Commission's benchmark approach discourages investment in such expansion. Capital investment in system upgrades or channel expansion is not included in external costs. Thus, unless a cable system opts for a cost-of-service showing, there is no mechanism for increasing rates to cover the cost of channel expansion. The Commission can build incentives for growth, expansion and application of new technology by considering capital costs on a going-forward basis as external costs to the benchmark.

CONCLUSION

In its rate regulation proceeding, the Commission set out to establish a mechanism simpler and easier to administer than cost-of-service rules. The Commission chose a benchmark approach that, while complex, still is less time-consuming and burdensome than full-blown cost-of-service regulation.

If the Commission truly wishes cable systems to subject their rates to the benchmark option rather than cost-of-service, the benchmark must allow for recovery on investments in expansion of plant and product. The current approach does not do so, to the serious detriment of programmers and, ultimately, the public who would benefit from new and more diverse programming. By adopting E!'s suggestions, the Commission can avoid a massive defection to cost-of-service, insure that progress in technology and programming will continue and still insure that rates for regulated cable service will remain reasonable.

Respectfully submitted,

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